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JOHN T. FEY, C

No. [redacted]949

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

MONOLITH PORTLAND MIDWEST COMPANY, a Corporation,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit herein.

OPINIONS BELOW

The District Court's Opinion is reported at 128 F. Supp. 824. The opinion of the Court of Appeals for the Ninth Circuit (R. 339) is reported at 240 F. 2d 444.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 7, 1957. (R. 347). Rehearing was denied without opinion on April 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the "fair compensation" guaranteed by the Contract Settlement Act of 1944 for termination of a contract to test an experimental alumina process is limited to mere reimbursement of out-of-pocket expenses; or whether the court may consider the substantial value of such contract in fixing "fair compensation" as this Court did in *De Laval v. United States,* 284 U.S. 61 (1931) and all similar cases.
2. (a) Whether such a contractor whose contract is terminated so that a governmental agency may complete the contemplated experimental operation, may maintain a suit against RFC, the Government's designated financial agent, for the *quantum meruit* value of the Government's post-termination, beneficial use of the *res* created; and,

   (b) Whether such a claim may be asserted as an element of, or evidence of "fair compensation" in a Section 13(b) suit under the Contract Settlement Act of 1944, or independently thereof, but joined to a claim for relief under the Act.

3. Whether it is proper in a suit for compensation under the Contract Settlement Act, to extend the *prima facie* correctness of a contracting agency's *ex parte* findings on termination claims to findings by the agency in its own favor exceeding the award to the war contractor, for events arising after the termination, and to render judgment for the agency on such claims solely on such presumption, in the face of substantial uncontradicted evidence to the contrary.
4. Whether it was error for the courts below to deny normal court costs to petitioner, the prevailing party, contrary to the rule announced by this Court in *RFC v. J. G. Menihan Corp.*, 312 U.S. 81 (1941).

STATUTES INVOLVED

The pertinent provisions of the Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 101 *et seq.*, and the War Mobilization and Reconversion Act of 1944, 58 Stat. 785, 50 U.S.C. App. 1651 *et seq.*, are set out in the Appendix, pp. 13-28.

STATEMENT OF THE CASE

1. Nature of the Case and Present Status

The status of this action[1] for compensation under the Contract Settlement Act of 1944 is that the judgment of the district court has been reversed and remanded for trial by jury. (R. 347). The Court of Appeals approved the trial court's limitation of compensation to expenses only, (128 F. Supp. 824, 842, 846) and gave no consideration to the value of petitioner's contract, or the value of the Government's use of petitioner's admittedly valuable process, as elements of "fair compensation." (240 F. 2d. 444, 449).

This question is of national importance, involving two basic industries (alumina and cement), a remedial Congressional direction to pay "fair compensation," and the continuing necessity for consistent, fair compensation to contractors whose contracts are terminated for the convenience of the Government or its corporate agents.

The decisions of the lower courts are in conflict with all reported decisions upon the question of compensation. This conflict should be eliminated before jury retrial instead of afterward, in this, the eleventh year of litigation.

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[1]The litigation has been before the courts for over ten years. Reported decisions in the first action, are reported as: *Monolith Portland Midwest Company v. Reconstruction Finance Corporation*, 178 F. 2d 854 (9 Cir. 1949), cert. den. 339 U.S. 932 (1950); Interlocutory decisions in this case are reported as: *Monolith Portland Midwest Co. v. Reconstruction Finance Corp.*, 95 F. Supp. 570 (1951) striking portions of petitioner's complaint and limiting petitioner to expenses only, and 102 F. Supp. 951 (1952), denying petitioner's request for jury trial.

2. Contract Right

The Ninth Court's 1949 opinion denying relief for non-exhaustion of administrative remedy acknowledged the motivation for the contract in suit.[2] Petitioner and the United States desired to determine commercial feasibility of extracting alumina from inexhaustible native ores by petitioner's process, which simultaneously produced partially processed cement. The commercial test of this unique plant for at least 90 days was the basic consideration for petitioner's execution of the contract. The underlying purpose was to free America from the cost and hazard of importation by using native ores in the strategic billion dollar aluminum industry.

On September 10, 1946, after petitioner had substantially completed the plant, respondent[3] gave notice

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[2]"The contract in suit was made on June 28, 1943 between appellant (petitioner), a cement company, and Defense Plant Corporation, a subsidiary of respondent Reconstruction Finance Corporation. The motivation for the contract was the mutual desire of appellant (petitioner) and the United States Government to determine the feasibility of commercially extracting alumina from our native anorthosite ores by a method developed (later patented) by appellant (petitioner). Defense Plant Corporation undertook to furnish the money necessary to construct and operate a test plant. Appellant (petitioner) agreed to supervise the construction of the plant and to license to Defense Plant Corporation the use of its process. The contract provided that appellant (petitioner) should operate the plant for Defense Plant Corporation for ten years subject to the right of either party to cancel the operating agreement upon thirty days notice, at any time after 60 days after completion of the plant. Defense Plant Corporation agreed that should it decide to dispose of the plant during the continuance of the operating agreement or within six months of its termination, appellant (petitioner) would have the first option to purchase." (*Monolith Portland Midwest Company v. Reconstruction Finance Corporation*, 178 F. 2d 854, (9th Cir. 1949).

[3]In 1945, Congress dissolved Defense Plant Corporation and respondent assumed Defense Plant Corporation's liabilities. Joint Resolution (Public Law 109) of June 30, 1945, c. 215, 59 Stat. 310.

of cancellation, justifying its notice under the War Mobilization and Reconversion Act of October 1, 1944. (R. 79). Respondent had no contractual right to cancel. On June 26, 1946 respondent and other agents of the Government (including Aluminum Industry representatives), met and determined to terminate petitioner's contract and hold the unique plant for operation by the Bureau of Mines.[4]

Although petitioner in writing protested and gave notice of its claims (Exhibits 136-144), the June 26th decision to appropriate petitioner's process and use the plant was carried out. The Bureau of Mines, after obtaining appropriations totalling $2 million, completed the plant and to some degree operated it. (T. 3644-3648, 3666-3696, 3728-3729; Exs. 21, 21A, 102, 102A). To date no report of the results of its operation has been made to the public.

After the Bureau of Mines abandoned the plant, its disposal was the subject of Congressional investigation. Its sale to Ideal Cement Company in 1955, was approved by the House Government Operations Committee, conditioned upon retention of the alumina testing facilities intact for ten years.

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[4]A memorandum of the conference of interested government agencies on June 26, 1946, (Exhibit BF) records that:

It was the consensus of opinion that ". . . *the best interest of the Government would be served by* Reconstruction Finance Corporation effecting the termination of the operating agreements covering the Harleyville and Laramie alumina plants . . . placing and holding the Harleyville and Laramie plants . . . in stand-by condition . . . thus affording to the Bureau of Mines, Department of Interior, an opportunity to obtain Congressional sanction for the use of the plants for further experimentation. . . ." (Italics ours).

To date, petitioner has not even been repaid the monies expended or expenses incurred in designing, equipping and creating the unique alumina pilot plant located at Laramie, Wyoming.

3. Admitted Events Establishing the Value of Petitioner's Process

In 1941 the Government solicited industry to aid in the solution of the existing aluminum crisis. (T. 123, Exhibit 17). Reynolds had been operating about one year, and Alcoa was the sole historical producer. (Exhibit 16, App. A, pp. 318-321).

In January 1942, petitioner submitted its cement-alumina process to the Government in confidence. (T. 128-150). The W.P.B. reported in March 1942, that this was the type of process it had been waiting for because all materials mined were used. (Exhibit 44). Petitioner was requested to demonstrate its process through a test plant stage. (T. 151-155).

On June 8, 1942 Alcoa recommended, and there was appropriated $56,000,000 to produce alumina from the then dwindling supply of the Nation's low-grade bauxite. (Exhibit 16, p. 196). The process used petitioner's process steps or their equivalent upon low-grade bauxite only, with no contemporaneous cement product. (T. 3365-3368). A plant was built at Hurricane Creek, Arkansas adjacent to the nearly exhausted sole domestic bauxite deposits. (Exhibits 16, p 202, 96, A-D). This plant was completed about 1945, and after Alcoa-Attorney General anti-trust negotiations was sold to

Reynolds Metals Company. (Exhibit 16, pp. 318-321). The negotiations involved Alcoa's claim that its process which the Hurricane Creek plant was built to use had a value of from $10-12 per ton. (Exhibit 20, App. E, p. 77). As of time of trial in 1953 the aluminum industry produced over 3,000,000 tons of alumina per year. (Exhibit 132).

During the period March 1942 to April 1943 petitioner demonstrated its process to W.P.B. by a test plant operation at its own expense. (T. 5171-5173). The W.P.B. recommended, and the Secretary of War directed, that respondent (Defense Plant Corporation) execute a contract with petitioner for the unique Laramie, Wyoming pilot plant. (Exhibits 51-54). The documents confirm the purpose of the plant to be:

> ". . . an experimental unit with the sole objective of determining whether or not the process can be applied successfully to the production on a large scale of alumina from anorthosite and/or clay." (Exhibits 52, 58, 110).

The importance to the national economy of a combined process producing alumina and cement, in times of peace or war, is partially stated in *United States v. Aluminum Company of America,* 91 F. Supp. 333, (S.D. N.Y. 1950): (p. 410)

> ". . . the refinement of these processes (alumina-from-clay) . . . constitutes an important avenue, if not the major avenue, of development in the industry. The elimination of the need for

foreign bauxite supplies could easily provide the initiator of a successful process with a tremendous cost advantage and would contribute greatly to our national security . . ."

After expenditure of $665,000,000 on plants alone in the wartime aluminum program (Exhibit 20, p. 3), the Government has directly or indirectly poured hundreds of millions of dollars into the aluminum program since the war.[5]

As the Congressional Committee said in recommending further alumina experimentation by government subsidy (Exhibit 20, p. 13):

". . . That would be cheap insurance for a nation that has just spent over $200,000,000,000 for a war won largely by aluminum airplanes."

At the end of the war, the Government commenced to dispose of its alumina and aluminum plants.[6]

Some disposals were finally effected by Alcoa's grant of a royalty-free license of the process used in the Hurricane Creek Alcoa operated government plant, to new producers, at the demand of the Surplus

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[5]Tax depletion allowances, short term "write-offs" subsidies, guaranteed purchase, e.g., Exhibit 19, pp. 7-8, government loans, and special priorities. All this has been done in an effort to comply with the policy announced by Congress (Exhibit 20, p. 44):

"It should be the deliberate national policy to keep the United States in a position second to no other nation in the size and technical progress of its light metals industry."

[6]Although many potential purchasers were interested in such purchases:

". . . All of the bidders except Alcoa, however, required Government assurance that bauxite would be available to them, or that it would be possible to purchase alumina at a competitive price" (Exhibit 16, p. 320).

Property Administrator (Exhibit 16, p. 321). However, Alcoa still dominated the industry.[7]

The Mobile, Baton Rouge and East St. Louis plants, three of the four plants expanded or built to use the low-grade bauxite process claimed by Alcoa, were abandoned. (T. 605, 3376, 3840-3844). The Mobile and Baton Rouge sinter plants were sold to the Ideal Cement Company (petitioner's competitor) for cement plant use at a price approximately 15% of their cost (T. 3857).

Only four alumina-from-clay experimental plants, each involving a different process, were authorized and built during the war (T. 603, 637-638). Three of these plants, after unsuccessful test, were cannibalized and sold by the Government at an average of about 13% of their cost. (T. 645, 646, Exhibit AA, R. 230-231). The Laramie project alone, admitted by the Bureau of Mines to be the best process submitted (T. 3721-3729), was terminated for the purpose of continued operation and thereafter operated. (Exhibit B-F).

After the Bureau of Mines completed its beneficial operation,[8] the Laramie plant was sold to Ideal Cement Company, for $1,373,000—about 31% of its original cost.

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[7]As the court said in *United States v. Aluminum Co. of America*, 91 F. Supp. 333 (S.D.N.Y. 1950): (p. 380)

"Such competition as presently exists in the domestic production of primary aluminum is due, almost entirely to the disposal program of the War Assets Administration. Reynolds and Kaiser are the beneficiaries of the execution of that program, and their existing financial structures, together with their respective capacities for development, must be viewed in the light of the governmental patrimony that has been showered upon them."

[8]The trial court held: 'the Government's money was well spent" in the Laramie plant (R. 266). Bureau of Mines used the plant as built (T. 3727-3728).

The parties stipulated below that the reproduction cost of the Laramie plant as of February 25, 1947, was $5,941,000 (R. 233), and as of March 1, 1950 was $6,712,000 (R. 233) or a gain of about $2,300,000 over its original cost, at the time the Bureau of Mines beneficially operated it.

4. The First Action

In 1946, petitioner commenced an action for compensation and to enjoin the cannibalization or other disposal of the plant, in order to minimize the loss it sustained by termination, after first advising RFC in detail of its claims. (Exhibits 136, 137, 139).

The District Court dismissed the action on the ground that petitioner had not obtained findings on its claims, and had not exhausted the remedy provided by the Contract Settlement Act of 1944. Upon appeal, the Circuit Court affirmed, holding that petitioner's sole claim to relief stemmed from the Contract Settlement Act. *(Monolith Portland Midwest Company v. Reconstruction Finance Corporation,* 178 F. 2d 854, 9th Cir., 1949).

This Court denied certiorari, 339 U. S. 932 (1950).[9]

[9]The Solicitor General then argued: "Petitioner has been remitted by the decision of the Court of Appeals to its administrative remedy. Subsequent to utilization of that remedy, petitioner may seek appropriate court review. In no sense have the courts below ruled on the merits of petitioner's termination claim." (Res. Br. 5).

5. Petitioner's Termination Claim

Petitioner filed a termination claim with RFC on January 16, 1950 (Exhibit N, l. 7) incorporating its 1946 notices and requests for settlement. RFC issued its *ex parte* Findings thereon on June 7, 1950 (R. 134). It there determined that any claim for relief or compensation in excess of petitioner's out-of-pocket expenses was improper. It found itself entitled to some $460,000 plus interest for damages allegedly incurred by being restrained by injunction from liquidating or "cannibalizing" this plant as it did all other experimental alumina plants following the war. This notwithstanding its pre-termination decision not to dispose of the plant—but to appropriate petitioner's process for Bureau of Mines operation of the plant (Exhibit B-F).

6. Error Below

By its complaint (R. 7), petitioner alleged the contract, its performance in creating the unique plant (including its costs), the termination notice and claims, the damages suffered thereby, and the existence of a dispute. It prayed for general declaratory relief, injunction, and compensation.

Long before trial the court declared the law to be that petitioner was limited by the Contract Settlement Act to its expenses only, and struck all allegations as to petitioner's damages flowing from the termination. (95 F. Supp. 570, (1951); R. 91-115).

Subsequently, the court denied petitioner's request for jury trial. (R. 162-173; 102 F. Supp. 951, 1952).

The case was tried by the court, November 5, 1952-February 20, 1953. Petitioner contended that it was erroneous to limit the compensation and relief accorded by the CSA to mere out-of-pocket expenses, and that it was entitled as a matter of law to have the "value of the contract", and the value of the Bureau of Mines operation taken into account in fixing "fair compensation."

On January 20, 1955, the trial court rendered its opinion (128 F. Supp. 824), followed by its Findings of Fact, Conclusions of Law and Judgment (R. 246-312) on February 10, 1955. In essence, the trial court:

(1) Confirmed its earlier refusal to consider the "value of the contract," the *quantum meruit* value of the Government's use of the plant, or any other elements except out-of-pocket costs, in fixing "fair compensation" under the Contract Settlement Act. (128 F. Supp. 824, 836, 846, R. 310).

(2) Ruled that Congress deliberately selected "fair compensation" as a phrase of art distinct and different from "just compensation"; (R. 259)

(3) Adopted R.F.C.'s *ex parte* Findings *in toto,* including the findings where R.F.C. purported to adjudicate its own affirmative claims against petitioner for events arising after the termination, and allowed R.F.C. some $150,000 on its $460,000 counter-claim;

based upon an assumed depreciation of the plant prior to the Bureau of Mines beneficial use.

7. The Decision of the Court of Appeals

Upon appeal the Court of Appeals below vacated the judgment and remanded the case to the District Court with instructions to grant a jury trial. (240 F. (2d) 444). The court devoted 6½ pages of an 8-page opinion to the jury trial point, and briefly concluded as to petitioner's claims for other than its costs: (p. 449)

> "In these respects, as well as on the questions of the termination of the contracts, 'fair compensation,' etc., we hold that the District Court correctly narrowed the factual issues."

8. Petitions for Rehearing.

Thereafter, respondent petitioned for rehearing on the jury trial issue, and petitioner petitioned for clarification, rehearing, and/or certification of the issue of "fair compensation" to this court. Both petitions were denied without opinion on April 1, 1957. The Court of Appeals also denied petitioner its normal costs of appeal.

REASONS FOR GRANTING THE WRIT

A. The Decision of the Court of Appeals, Affirming the Trial Court's Limited Construction of the "fair compensation" Provided in the Contract Settlement Act, to Mean Reimbursement of Expenses Only, Involves An Important Question of Federal Law Fundamental to the Conduct of the Case. It is Erroneous and Contrary to All of the Decisions of This Court. If Not Reversed, No Citizen Can Rely Upon Fair Treatment When Contracting With the Government.

1. The "fair compensation" provided by the Contract Settlement Act to a contractor whose contract has been terminated for the convenience of the Government is identical to the "just compensation" allowed for other comparable Government takings.

The basic and all-permeating error of the trial court was its holding that "fair compensation" was deliberately used as a phrase of art by Congress to provide a "different measure of recovery" than just compensation (128 F. Supp. 824, 842), citing no direct authorities or legislative history in support of its radical departure from the century old judicial recognition that the generic noun "compensation" is controlling, and that the various adjectives such as "just," "fair" or "reasonable" add nothing to the provision.

The trial court's decision is in square conflict with all of the many decisions of this Court and the Courts of Appeal dealing with "compensation", and the court

below cites no reason for distinguishing such well considered and established precedents.

Thus, *United States v. Peewee Coal Co.*, 341 U.S. 114, 118 (1951) when discussing *just compensation* under the Fifth Amendment, speaks of:

> ". . . the Government's obligation to pay *fair compensation* for property taken . . ." (Italics added).

In the early case of *Monongahela Navigation Co. v. United States*, 148 U.S. 312, (1893) the court said: (p. 326)

> ". . . The noun 'compensation', standing by itself, carries the idea of an equivalent . . . so that if the adjective 'just' had been omitted and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property."

In *Wilson Athletic Goods Mfg. Co. v. United States*, 161 F. 2d 915 (CCA 7th 1947) the court, in construing the "fair and just compensation" provision of the Act of October 16, 1941 (50 U.S.C.A., App. Sec. 721), stated: (p. 917)

> "A fair, just and reasonable compensation means one that takes into account all factors . . ."

The same Congress that enacted the Amendments and Extensions to the Act of October 16, 1941 enacted the CSA. Interchangeable use of the adjectives "fair"

and "just" by this same Congress, approved by the courts, completely negatives the asserted congressional intent that the "fair compensation" in the CSA was intended to provide "a different measure of recovery" than that traditionally employed for governmental invasions of private property.

As the court said in *New Haven Water Co. v. City of New Haven,* 106 Conn. 562, 139 A. 99 (1927), when urged by counsel to distinguish "fair compensation" and "just compensation" held: (p. 105)

> " . . . (this question) becomes immaterial since both mean the same thing. 'Just' is the equivalent of 'fair'."

In light of this court's recent concern with over-restrictive definitions of the elements of just compensation which are more concerned with form than substance *(United States v. General Motors Corp.,* 323 U.S. 373 (1944)), petitioner strongly submits that the trial court's error in its restrictive limitation of "fair compensation" to reimbursement of expenses only requires that certiorari be granted. This Court should correct such error, otherwise a Congressional direction to "fairly" compensate a contractor for termination of his contract will be ignored. A decision on this point will be fundamental to the further conduct of the case below.

2. "Fair Compensation" provided by the Contract Settlement Act includes the "value of the contract" terminated for the convenience of the Government, in accordance with the principles enunciated by this Court in *De Laval v. United States*, 284 U.S. 61 (1931), and other similar cases.

The trial court ruled that "fair compensation" did not include the "value of the contract" (128 F. Supp. 824, 846; C. of L. XXVIII, R. 298). Value of the contract of necessity is evidenced by the value of the detriment petitioner suffered by being deprived of its primary consideration, and by the benefits conferred by petitioner's performance, including furnishing a process, "know-how" and expenses, which resulted in a pilot plant. The Court of Appeals did not discuss or mention the point of value in its brief and sketchy discussion of issues other than jury trial. However, its statement that the trial court's rulings on "fair compensation" "correctly narrowed the factual issues" (240 F. (2d) 444, 449) apparently approved the trial court's conclusions of law striking the pleadings upon this aspect of compensation and limiting the issue. This ruling was erroneous because it is in direct conflict with decisions of this Court holding that where a contract is terminated, cancelled, or taken, the "value of the contract" is a proper element of the compensation for the taking.

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893);

Seaboard Air Line Railway Co. v. United States, 261 U.S. 299 (1923);

United States v. New River Collieries Co., 262 U.S. 341 (1923);
Brooks-Scanlon Corporation v. United States, 265 U.S. 106 (1924);
De Laval Steam Turbine Co. v. United States, 284 U.S. 61 (1931).

As this Court said in *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, (1931), which involved the question of a war contract "cancellation" or termination, in deciding that the "value of the contract" was a proper and essential element of "compensation": (p. 71)

> " 'It is the sum which, considering all the circumstances—uncertainties of the war and the rest —probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy'."

The trial court apparently labored under the misapprehension that the RFC had not "taken" anything of Monolith's and therefore the rules of compensation announced by the Supreme Court did not apply. (128 F. Supp. 824, 842). This was erroneous as a matter of law. In *United States v. General Motors Corporation*, 323 U.S. 373 (1944) the court clarified the meaning of a "taking" when it said: (p. 378)

> "In its primary meaning the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

Thus, the termination by RFC of appellant's contract and the destruction of appellant's rights under the contract, together with the Government's continued operation of the plant, was clearly a taking.

3. The "fair compensation" provided by the Contract Settlement Act includes the *quantum meruit* value of the Government's post-termination beneficial use of the alumina plant through Bureau of Mines.

Although the contract in suit was terminated under the War Mobilization and Reconversion Act of 1944, by a September 10, 1946 "Notice of Cancellation" (R. 79) which recited:

"... the facilities are no longer required ..."

the blunt fact is that the Government had resolved some three months earlier to terminate so that the Bureau of Mines—instead of petitioner—could carry on the experimental operation provided by the contract. (Exhibit B-F, R. 76, 77).

In plain English, the contracting agency framed its Notice of Cancellation in an attempt to comply with the requirement of Section 202 of the War Mobilization and Reconversion Act that contracts so terminated are no longer used or needed by the Government. The Government was apparently prevailed upon to state this reason in respondent's cancellation notice, because the decision had then been made to proceed with the experimental operation. (Exhibit B-F). By the simple expedient of termination, the Government was led to believe, or was prevailed upon to believe that it could obtain the desired results without fairly compensating petitioner. It deliberately singled out the one process the Government had "been waiting for" (Exhibit 44) and terminated petitioner's contract, with the intent to continue using it.

The Bureau of Mines thereafter spent some $2,000,000 in an experimental operation using petitioner's patented process. The details and report of this operation have yet to be made available to the public or petitioner.

The procedure employed in this case by the agencies concerned calls to mind the language of this Court in the case of *Lichter v. United States*, 334 U.S. 742 (1948): (p. 754)

> "In procedure which affects property rights as directly and substantially as that authorized by the Renegotiation Act, the governmental action authorized, although resting on valid constitutional grounds, is capable of serious abuse . . . Within procedure thus authorized by the Constitution,

> the Congress and the Administration, and here affirmed, *resulting injustices can and should be carefully examined and as far as possible, relieved . . .*" (Italics added).

Petitioner submits that the inequitable conduct by responsible public officials in this transaction should be corrected in the only way now possible—by payment of "fair compensation" which will include the benefits obtained by the Government and the detriment suffered by petitioner by the termination.

As the Supreme Court stated in *Dermott v. Jones*, 64 U.S. (23 How.) 220 (1859): (p. 233)

> ". . . Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred is really worth . . ."

In this case there were three important rights or interests—the contract for construction and operation, the acceptance of the benefits of appellant's construction, and the licensing contract by which appellant shared its patents with RFC.

When RFC terminated the contract, it "took" the contract by destroying it, and thereafter, its principal, the United States, used the patented process and the unique plant. The termination thus in practical effect destroyed the years of patent life dedicated by petitioner to the Laramie project, and the years required

to build and bring a new plant to the point of operational test of the patented process. By the Contract Settlement Act, Congress designated respondent as the financial agent of the United States to pay fair compensation in an amount determined by a court of competent jurisdiction in accordance with existing law.

Appellant submits that this state of facts brings the case squarely within the analogy drawn by the Supreme Court in *United States v. General Motors Corporation,* 323 U.S. 373 (1944).

There the petitioner was the owner of a long-term lease. The Government by condemnation, carved out a short-term occupancy, and the court allowed compensation pro-rata on a long-term basis only, refusing petitioner's proof of actual losses as elements to be considered in fixing compensation. The Supreme Court held: (p. 382)

> "It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding, chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates."

4. The "fair compensation" provided by the Contract Settlement Act is not limited to mere reimbursement of out-of-pocket expenses.

The trial court held that petitioner's recovery was limited to mere reimbursables only under Section 6(d) of the Contract Settlement Act. (128 F. Supp. 824, 842). This holding was in error for many reasons, for example:

(a) It is contrary to the many decisions of this Court stating the principle that the ascertainment of compensation is a judicial function—not a legislative function. *(Monongahela Nav. Co. v. United States,* 148 U.S. 312, 327; *Seaboard Air Line Ry. Co. v. United States,* 261 U.S. 299, 304).

(b) It is contrary to the intent of Congress as shown by Congressman Wolverton's explanation of the Act (90 Congressional Record 6076):

> ". . . No existing remedy that a claimant now has under the law is taken from him, but in addition thereto he is given an opportunity to avail himself of a settlement procedure that can facilitate his settlement if he desires . . ."

(c) It is contrary to the internal evidence of the Act itself which clearly shows that the standards for settlement enumerated in Section 6(d) were for guidance to agency settlements only and are not binding on the courts in a Section 13 suit.

The term "fair compensation" is the most important phrase used in the Act. If, as the trial court as-

serts, it is a phrase of art and intentionally used by Congress to restrict the compensation paid to reimbursables only, Congress would surely have defined it in Section 3 when it defined eighteen other words and phrases used in the Act. Or, it would have been quite simple to add to Section 6 or Section 13 the words: "no additional compensation shall be paid except as herein provided," or other words of limitation. Had Congress intended to limit the plain and literal meaning of "fair compensation," it could easily have found apt words to do so. *(United States v. Lexington Mill & Elevator Co.,* 232 U.S. 399, 1913).

Petitioner submits that it is clear that Congress did not attempt to limit proper judicial inquiry under Section 13 as to what would be "fair" or "just" or "equitable" under any given circumstances. After obtaining *ex parte* findings by the agency, the contractor remains free to pursue his traditional court remedy. (Section 13(b).) In such proceeding the court will consider the claim made, and subject only to the *prima facie* correctness of the facts found by the agency, will determine "fair compensation" "in accordance with existing law . . ." (Section 13(b)(2)), and will enter judgment on the "law and the facts" (Section 13(c)(3)). It is settled that such a direction in a remedial statute such as the Contract Settlement Act authorizes such judgment:

> ". . . as, under all the evidence, would be consistent with law . . ." *(United States v. Cumming,* 130 U.S. 452, (1889).)

Section 6 of the Act, relied upon exclusively by the trial court in limiting petitioner to reimbursables (128 F. Supp. 824, 842), merely requires the agencies (not the courts) to negotiate speedy settlement of war contract claims after considering certain designated standards, "in accordance with the terms of this Act." Section 6 does not even purport to limit a court in the required judicial determination of compensation in fact. The trial court's narrow, restrictive interpretation ignores the balance of the Act, including Section 13, where Congress repeatedly directs that contractors be fairly and equitably compensated. In addition, it is "tailored" to the necessities of the agency, revives the discredited "most favored litigant" status for governmental corporations, and thwarts substantial justice.

Petitioner submits that in a Section 13 suit for fair compensation, as in any other suit for compensation for a governmental taking, the test should be the requirement of "just compensation". The most reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case. *(United States v. Peewee Coal Co.,* 341 U.S. 114 (1951).

The declaration in Section 1 of the Contract Settlement Act that an objective of the Act is:

> ". . . (b) to assure to prime contractors . . . speedy and equitable final settlement of claims . . ."

as well as the prohibition of Section 20(e) that:

> "Nothing in this Act shall be deemed to *impair* or modify any war contract . . ." (Italics added)

alone clearly demonstrate the errors below.

5. The Court below mistakenly overlooked the declaratory relief sought by Petitioner.

In the third cause of action of its original complaint petitioner incorporated the previous factual allegations of its complaint, which merely alleged the ultimate facts of the transaction (R. 23), that an "actual controversy" existed and that there should be a judicial declaration of rights (R. 24) and prayed: (R. 26)

> "8. That the Court determine and declare the legal rights and duties of the plaintiff and defendant in the premises."

In response to RFC's motions to strike, etc. (R. 82 *et seq.*) the trial court in its Opinion of January 22, 1951 (R. 91, 95 F. Supp. 570) stated: (R. 11[illegible])

> ". . . The motion to strike is denied as to plaintiff's third cause of action for declaratory relief and this court, by this opinion has declared the rights of the parties in the controversy between them."

As pointed out above, the trial court had, by such opinion, limited petitioner to reimbursables only. It thereafter confirmed this restrictive interpretation of

the CSA by its final opinion (128 F. Supp. 824) and it Findings of Fact and Conclusions of Law. (R. 246).

Therefore, the correctness of the trial court's declaration of the rights and duties of the parties arising out of the transaction and under the CSA, was squarely before the Ninth Court on appeal. (Points on Appeal, #1(a), R. 323; Spec. of Errors, #1, 2, Appendix I, pp. 1-5).

This point is based not on a play on the words "breach of contract" or "specific performance" etc., but upon the ultimate facts well pleaded, and the construction of the CSA.

Petitioner apprehends that the Court below may have been misled by the trial court's final opinion (128 F. Supp. 824) into believing that the only legal points (doubtful as they are) involved as to "fair compensation" (except reimbursables) were the propriety of "breach of contract" and "specific performance" under the CSA (e.g., see 240 F. 2d 444, 449). Such is not the case.

Leaving aside the first two causes of action the plea for declaratory relief still demands review. Was the trial court correct, or was it in error when it limited appellant's recovery to reimbursables as a matter of law?

B. The Decision of the Court of Appeals, Approving the Trial Court's Unqualified Acceptance of the Contracting Agency's Findings Has Decided an Important Question of Federal Law in a Manner Inconsistent With the Decisions of This Court.

The trial court ruled that all of RFC's *ex parte* findings (without hearing) were *prima facie* correct. (128 F. Supp. 824, 879). Based on this presumption, the court allowed RFC some $150,000 in *affirmative* relief, (on a cross-claim for $460,000) for alleged damages suffered by reason of the injunction *after* the termination. This ruling was erroneous and plainly prejudicial, and denied petitioner procedural due process.

The Contract Settlement Act provides in Section 13 that the contracting agency shall make findings:

> ". . . upon *his* (the contractor's claim or part thereof . . ." (Italics added).

When petitioner filed its claim, RFC, by its *ex parte* findings asserted a cross-claim for injunction damages. This was a claim for affirmative relief. The findings determined that petitioner was indebted to RFC. At trial petitioner relied upon the stipulated evidence that the plant had *in fact* increased some $2,300,000 in value (Exhibit AA) and not depreciated, as RFC claimed in its findings, and that it had thereafter been extensively and beneficially used by the

Government.[10] The trial court ignored this evidence and relied upon the supposed presumptive correctness of RFC's findings of "paper depreciation" during the injunction.

Petitioner concedes the procedural propriety of RFC's cross-claim in a Section 13 suit, but earnestly denies the premise that RFC could exceed the finding making power in the Act, and by the simple device of making *ex parte* findings, shift its own burden of establishing the right to affirmative relief, and recover solely on the strength of the supposed presumption of correctness. This becomes even clearer when it is remembered the Court ignored evidence to the contrary.

Petitioner submits that the trial court's misconstruction of the scope, extent and effect of *ex parte* agency findings under the Act is contrary to fifty years of uniform construction of the finding making power of administrative agencies, upon judicial examination thereof.

By such a procedure as was here authorized, RFC is at the same time a party, an expert witness, a lawyer, a judge and a jury. Such was not the intent of Congress in enacting the remedial Contract Settlement Act.

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[10]Thereafter, the plant was sold to petitioner's competitor, Ideal Cement Company for much more than similar plant disposals, e.g.: Ideal bought the Mobile and Baton Rouge Plants for 15% of cost. (T. 3857). The sale of the other 3 experimental plants averaged 13% of cost (Exhibits AA, R. 230). The Laramie Plant sale brought 31% of cost.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

DATED: April 30, 1957.

Respectfully submitted,

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